

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	RICHARD GUERRIERO, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	MICHAEL A. DELANEY, ESQ.	
7	On behalf of the Respondent	28
8	ORAL ARGUMENT OF	
9	NICOLE A. SAHARSKY, ESQ.	
10	For United States, as amicus curiae,	41
11	supporting Respondent	
12	REBUTTAL ARGUMENT OF	
13	RICHARD GUERRIERO, ESQ.	
14	On behalf of the Petitioner	51
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first today in Case 10-8974, Perry v. New Hampshire.

5 Mr. Guerriero.

6 ORAL ARGUMENT OF RICHARD GUERRIERO

7 ON BEHALF OF THE PETITIONER

8 MR. GUERRIERO: Mr. Chief Justice, and may
9 it please the Court:

10 An eyewitness identification made under a
11 suggestive influence presents a unique danger of
12 misidentification and a miscarriage of justice. It is
13 that danger of misidentification which implicates due
14 process and requires an evaluation of the reliability of
15 the identification. The constitutional --

16 JUSTICE SOTOMAYOR: Counselor, does your
17 position depend on police involvement at all?

18 MR. GUERRIERO: No, Your Honor.

19 JUSTICE SOTOMAYOR: I'm -- if a private
20 investigator shows a picture or -- that has no
21 connection to the police, a company's investigator?

22 MR. GUERRIERO: What I suggest --

23 JUSTICE SOTOMAYOR: Or the news media
24 publishes a picture of someone that it thinks --

25 MR. GUERRIERO: I have a two-part answer to

1 that. The -- the significance of the suggested
2 influence is how it affects reliability. Most of the
3 time that influence, the defense will allege, is from
4 some police activity, and rightly so because they are
5 mostly involved and rightly so because police suspicion
6 is the kind of influence that would direct the witness's
7 attention and say that's the man.

8 But it's not necessarily required, and in
9 fact one of the Federal court of appeal cases, Dunnigan
10 v. Keane, involved exactly that, a private investigator,
11 where a private investigator from a bank showed
12 surveillance photos to the witness and then later the
13 witnesses made an ID.

14 JUSTICE SCALIA: Mr. Guerriero, if it's
15 not -- if it's not limited to suggestive circumstances
16 created by the police, why is unreliable eyewitness
17 identification any different from unreliable anything
18 else? So shouldn't we look at every instance of
19 evidence introduced in criminal cases to see if it was
20 reliable or not?

21 MR. GUERRIERO: No, Your Honor. I suggest
22 that eyewitness identification evidence is unique, and I
23 think that this Court recognized that in Wade and in the
24 subsequent cases, in fact described it at that time as
25 probably the leading cause of miscarriages of justice.

1 And in fact experience with the DNA exonerations that
2 we've seen recently in the last 10 or 15 years have
3 shown that.

4 JUSTICE GINSBURG: So at least for all
5 eyewitness testimony, there would have to be some
6 pretesting for reliability? Is that -- is that your
7 contention?

8 MR. GUERRIERO: No, Your Honor, and I don't
9 think that's exactly what the Court said in Wade and the
10 subsequent cases. It's the combination of eyewitness
11 identification testimony plus the suggestive influence
12 which makes -- which brings it to sort of the height of
13 suspicion and creates the greatest risk.

14 JUSTICE GINSBURG: And in this case, in
15 which category do you place the eyewitness testimony?
16 Is it police suggestion, or is it suggestive but not
17 through any manipulation on the police's part?

18 MR. GUERRIERO: In our case, we do not
19 allege any manipulation or intentional orchestration by
20 the police. But our position is that it appeared to the
21 witness, to Ms. Blandon, that Mr. Perry was in fact a
22 suspect, and she looked down and there was that
23 suspicion.

24 Now, if we had been able to have our due
25 process claim heard, the judge may or may not have

1 agreed that that was suggestive and created a risk.

2 But --

3 JUSTICE SCALIA: Do you think that our cases
4 which exclude or -- or require reversal when there is
5 eyewitness testimony impaired by the police, you think
6 that's really limited to eyewitness testimony? Suppose
7 the police created suggestiveness in another category of
8 evidence. Let's say -- let's say voice evidence, that
9 the killer had left a message on the -- on the phone and
10 the police in some manner create suggestiveness that
11 causes a witness to identify that as the voice of the
12 killer. You really think that we would say, well, this
13 is not eyewitness testimony; eyewitness testimony
14 creates a special risk? Don't you think that we would
15 say whenever the police render evidence unreliable it --
16 it should be excluded?

17 MR. GUERRIERO: I think that may be a
18 separate due process claim. For example, if the
19 police --

20 JUSTICE SCALIA: Exactly. But -- but
21 that -- that impairs your -- your argument, because if
22 we accept your argument for eyewitness we should
23 similarly accept it for everything else. There is
24 nothing special about eyewitness.

25 MR. GUERRIERO: I -- I disagree, Your Honor.

1 I think that what the Court has said is that there is
2 something special about eyewitness identification
3 testimony.

4 JUSTICE SCALIA: I'm saying we don't mean
5 it.

6 (Laughter.)

7 MR. GUERRIERO: Well --

8 JUSTICE SCALIA: I'm saying that it's
9 unbelievable that if the -- if the police created
10 testimony, not eyewitness testimony but testimony that
11 was unreliable because of police suggestiveness, I think
12 we would throw that out as well. Don't you think so?

13 MR. GUERRIERO: I -- well, I think that in
14 any case, and I think the Court has said this in other
15 circumstances, that in any case a defendant could raise
16 a due process claim and say, either because of the way
17 the prosecution handled the evidence or because of the
18 -- the combination of rulings on evidence, that there
19 was a due process violation that implicated fundamental
20 fairness.

21 JUSTICE KENNEDY: In this case, suppose that
22 the police talked to this -- to the lady that was in the
23 -- in the apartment and saw the thing out the window and
24 said, we -- we think we've solved this case but you
25 can't look at this man. We don't want to you look at

1 this man. Don't tell us. We're not going to let you
2 look out that window. It seems to me that the defendant
3 might have a due process argument that the police
4 interfered, that she couldn't say right when he was
5 there, that's not the man.

6 I don't know what you want the police to do
7 in this case. It seems to me it would have been, A,
8 risking this argument from the defendant, and B,
9 improper police conduct, not to ask the woman is this
10 the man?

11 MR. GUERRIERO: I disagree, Your Honor. If
12 the police wanted to ask her to make an identification,
13 they could have done a line-up procedure or a photo
14 line-up procedure fairly promptly that would be distinct
15 from and much more fair than the show-up at the scene.
16 And there was no emergency or exigency here that would
17 require a show-up.

18 JUSTICE SCALIA: What about -- what about
19 unreliable eyewitness testimony in favor of the
20 defendant? Let's assume the same suggestiveness that
21 causes you to exclude it when it's been introduced by
22 the prosecution, but here it's being introduced by the
23 defendant to show that it was somebody else, okay? Is
24 that going to be excluded?

25 MR. GUERRIERO: It may be excluded under the

1 rules of evidence, but the Due Process Clause doesn't --

2 JUSTICE SCALIA: Do you think it should be
3 excluded under the rules of evidence? If you say it's
4 so unreliable -- this is a one-way door?

5 MR. GUERRIERO: The Due Process Clause --

6 JUSTICE SCALIA: All of the evidence that --
7 that causes the defendant to be convicted is excluded,
8 but -- but any -- any evidence -- any evidence on the
9 other side is not?

10 MR. GUERRIERO: Well, the defendant is
11 obviously not trying to deprive the State of its liberty
12 in the same way that the State is trying to deprive the
13 defendant of his liberty at trial, so the Due Process
14 Clause would not apply in that sense. That's not to say
15 that there wouldn't be evidentiary grounds for the State
16 to raise that objection.

17 JUSTICE SCALIA: Well, you see, when -- when
18 it's the State that causes the unreliability, I can see
19 why it is a -- a ground that can be invoked only by the
20 defendant. But when you come up with a theory that it
21 doesn't matter whether the State was the cause or not, I
22 don't know why it wouldn't work both ways, that the
23 evidence is inherently unreliable and it ought to be
24 excluded whether it helps the defendant or hurts the
25 defendant.

1 MR. GUERRIERO: It -- it --

2 JUSTICE SCALIA: Once -- once you take the
3 State out of the mix there is no reason to limit it to
4 the -- to the defendant.

5 JUSTICE GINSBURG: You -- you answered that
6 due process works only in favor of the defendant.

7 MR. GUERRIERO: That's right.

8 JUSTICE GINSBURG: Not in favor of the
9 State.

10 MR. GUERRIERO: That's right.

11 JUSTICE GINSBURG: And that is your only --
12 your only distinction. You are saying that this is a
13 one -- one-way --

14 MR. GUERRIERO: That's right, Justice
15 Ginsburg.

16 JUSTICE GINSBURG: -- street.

17 JUSTICE SCALIA: Well --

18 JUSTICE ALITO: I take it from your -- I
19 take it from your answers that simple unreliability is
20 not enough. If there's testimony --

21 MR. GUERRIERO: That's right.

22 JUSTICE ALITO: -- eyewitness testimony that
23 seems of very dubious unreliability, that cannot be
24 excluded.

25 MR. GUERRIERO: That's right. I --

1 JUSTICE ALITO: Something more is needed.

2 MR. GUERRIERO: That's right, and I might
3 even go further.

4 JUSTICE ALITO: Something more is needed;
5 suggestiveness is needed.

6 MR. GUERRIERO: That's right.

7 JUSTICE ALITO: But suggestiveness doesn't
8 require any police involvement? Is that right?

9 MR. GUERRIERO: That's right.

10 JUSTICE ALITO: Can you just define what you
11 mean by suggestiveness?

12 MR. GUERRIERO: Well, I think the court has
13 given examples. If it's effectively a show-up or a
14 show-up. The example in Foster involved a couple of
15 different kinds of suggestiveness. One was where the
16 police did a line-up where the defendant was the only
17 common person.

18 JUSTICE ALITO: Yes, but those are all
19 situations where the police is involved, the police are
20 involved.

21 MR. GUERRIERO: Right. The nonpolice
22 examples of suggestiveness that rise to the due process
23 level are mostly going to be show-ups. The example in
24 Dunnigan v. Keane was a private investigator showing,
25 from the bank, that they had an ATM card that was stolen

1 from the person.

2 JUSTICE ALITO: Well, what if you have
3 cross-racial identification? Would that qualify on the
4 ground that studies have shown that those may be less
5 reliable.

6 MR. GUERRIERO: That may be a separate
7 grounds to move for a jury instruction or for an expert.
8 I'm not sure that -- we certainly don't argue here and
9 it wasn't argued below that that's a separate due
10 process ground.

11 JUSTICE SCALIA: Why not? I mean, that's
12 the point. Why not? What about an eyewitness
13 identification from 200 yards? You know, normally you'd
14 leave it to the jury and the jury would say that's very
15 unlikely. But you want to say it has to be excluded and
16 if it's not you retry the person. What is magic about
17 suggestiveness as opposed to all of the other matters
18 that could cause eyewitness identification to be wrong?

19 MR. GUERRIERO: Two answers to that, Your
20 Honor. First, it's not that these things are always
21 excluded, and in fact the Court has set a very high bar.
22 I mean, the standard is this evidence is excluded only
23 if it's very substantially likely to lead to a
24 misidentification. So --

25 JUSTICE ALITO: I understand that, but I

1 need to know what you mean by suggestiveness. What does
2 that mean? Can you just give me a definition of it?

3 MR. GUERRIERO: It is conduct or
4 circumstances that point -- that tell the witness that's
5 the man. And most commonly it would be showing a single
6 photograph or presenting the person as a suspect or it
7 appearing, as in this case, that the -- the defendant
8 was a suspect. And that's essentially how the Court has
9 defined it, as conduct that says that's the man.

10 So there may be some things that the defense
11 argues that are suggestive and the trial court looks at
12 it and says, you know, that's a very slight suggestion.
13 You say he is the only guy in the line-up with a
14 mustache. I don't even -- I'm not going any further. I
15 don't think that's sufficient suggestion. That doesn't
16 qualify as saying that's the man.

17 JUSTICE KAGAN: But just to repeat Justice
18 Scalia's question, once you're not talking about police
19 suggestiveness, once you're talking about suggestiveness
20 that arises from non-State conduct, why should we be
21 focused on suggestiveness as opposed to any other cause
22 of unreliability?

23 MR. GUERRIERO: Well, because that's what --
24 my first reason is that that's what the Court focused on
25 in Wade as the main danger.

1 JUSTICE KAGAN: Well, the Court was focusing
2 on police suggestiveness. That's the context of all our
3 cases. Now, you might say, well, look, there is a
4 bigger problem and the bigger problem is the
5 unreliability of identifications generally, but that
6 doesn't relate to suggestiveness per se.

7 MR. GUERRIERO: Well, I think our position
8 is in between there. We are not saying that there is a
9 due process right to have eyewitness evidence excluded
10 generally without some suggestiveness. What we are
11 saying is that if the suggestion comes from a nonpolice
12 source or if it, as in this case, involved the police
13 but their involvement was unintentional, it's just
14 accidental, that that suggestiveness should still be
15 considered because --

16 JUSTICE ALITO: What does that mean?

17 JUSTICE GINSBURG: Do you distinguish -- do
18 you distinguish the husband's situation? He was an
19 eyewitness too, but there was a motion to suppress her
20 testimony. Is that an example where there is an
21 eyewitness testimony but no suggestiveness? Why didn't
22 you move to suppress the husband's statement?

23 MR. GUERRIERO: Trial counsel simply did not
24 move to suppress that testimony. I don't have a good
25 explanation and, to be frank, I would have filed the

1 motion to suppress his testimony.

2 JUSTICE GINSBURG: So you'd put them both in
3 the same category?

4 MR. GUERRIERO: I would have.

5 CHIEF JUSTICE ROBERTS: Why isn't it -- this
6 may be -- just again following up on Justice Alito's
7 question, but there is always a degree of
8 suggestiveness. It's not like the person is picked
9 randomly off the street and saying, you know, do you
10 know this person? It's in the context of an
11 investigation. The person has some contact with it. So
12 there is always some suggestiveness that, well, this
13 person might have something to do with what went on.

14 MR. GUERRIERO: That's right. And if it
15 rises to a level of what the Court has given as examples
16 of a show-up or the same defendant appearing in a
17 line-up or something else that says that's the man, then
18 that raises a red flag. And it's not a --

19 CHIEF JUSTICE ROBERTS: But whenever --
20 whenever the witness is asked, at least there is a
21 suggestion that this might be the man. And I don't know
22 why you would think that's any greater than this is the
23 man. The police don't come up usually and say, this is
24 the person that we think did it; is that who you saw?
25 They say, did you see this guy?

1 MR. GUERRIERO: Actually, I disagree with
2 that aspect of your question, Your Honor. And in fact I
3 think the proper police procedure in certainly the
4 police departments that I'm familiar with will instruct
5 the witness that, do not assume that anyone that we
6 think is a suspect is in this line-up. And that's in
7 the standard witness instructions, and they may even do
8 multiple line-ups where they say, okay, we are going to
9 show you three sets of eight and the suspect -- or there
10 may or may not be a suspect in any of them. We just
11 want you to look at this set and see if anyone --

12 CHIEF JUSTICE ROBERTS: Well what about a
13 situation like the one we had here, where you're not
14 talking about a line-up.

15 MR. GUERRIERO: That's right.

16 CHIEF JUSTICE ROBERTS: But you're talking
17 about the scene of a crime, and the police says, do you
18 know this person, did you see this person, or anything
19 else? That in itself, any type of identification in the
20 course of an investigation, I think you would have to
21 say is suggestive, because the person is not picked up
22 randomly.

23 MR. GUERRIERO: It is, but the key is that
24 it's not the suggestion that results in exclusion. It's
25 the suggestion that raises the red flag that allows the

1 defendant to say, would the trial court please evaluate
2 this according to the standards.

3 CHIEF JUSTICE ROBERTS: So this is -- again,
4 this is just following up, I guess. But I remember in
5 law school one of the things in criminal law, the
6 professor says, all right, everybody be quiet. And then
7 a certain amount of time goes by and then he starts
8 asking people, well, how much time went by? And
9 people -- some people say 4 minutes, some people say,
10 you know, 1 minute. And it turns out, if I'm
11 remembering correctly, to be a lot shorter than most
12 people think.

13 So that's at least, the point that was
14 trying to be made anyway, at least as unreliable as
15 eyewitness testimony. So your argument would have to
16 cover that, wouldn't it?

17 MR. GUERRIERO: I --

18 CHIEF JUSTICE ROBERTS: You know, how long
19 were you there before this individual came into the
20 shop? The person says, I was there for 5 minutes, and
21 that ruins the person's alibi, when it turns out, you
22 know, study after study would say it really was 45
23 seconds or 1 minute.

24 MR. GUERRIERO: I think it's important to
25 look back at what the Court said in Wade and in fact how

1 what the Court said in Wade has been borne out. Of
2 course, there is aspects of unreliability to any kind of
3 evidence. Somebody could come and claim that there is
4 issues with false confessions or issues with forensic
5 evidence. I think last term somebody made a claim --
6 tried to assert a claim regarding DNA evidence that was
7 akin to an eyewitness identification claim.

8 But the point is that this kind of evidence
9 was singled out by the Court and recognized as having
10 particular dangers, and it's been borne out by the
11 studies, not psychological --

12 JUSTICE KENNEDY: But again, that was in the
13 context of procedures that the police had instituted.

14 MR. GUERRIERO: It may be that --

15 JUSTICE KENNEDY: And your -- and your
16 rationale goes much beyond it. In a way you're
17 infringing on the province of the jury. I don't usually
18 like to reminisce, but there was a case I had where a
19 prosecution witness was very, very certain, all too
20 certain, and I said: Do you ever take your wife out to
21 dinner or go out to dinner with friends? And he said:
22 Oh, yes. I said: Has it ever happened to you that
23 midway in the meal you say, is that our waiter, and
24 you've seen -- the waiter has brought you the menu, he
25 has taken your order, he has brought your food, and you

1 were under no stress at the time.

2 MR. GUERRIERO: Right.

3 JUSTICE KENNEDY: And there was good light.

4 So you teach the jury this way. And you're
5 just -- you're just usurping the province of the jury,
6 it seems.

7 MR. GUERRIERO: I don't think so, Your
8 Honor. I mean, I think what this Court has said is that
9 this is a special category of evidence that has to be
10 red-flagged by or can be red-flagged by the defense for
11 the trial judge to look at it and say --

12 JUSTICE BREYER: What is --

13 MR. GUERRIERO: -- on a case by -- I'm
14 sorry.

15 JUSTICE BREYER: Go ahead. You were saying
16 on a case -- all you want to do is red-flag it for the
17 judge.

18 MR. GUERRIERO: And then the trial judge
19 would look at it and in the rare case where he says it's
20 very substantially likely, which we agree is a high
21 standard --

22 JUSTICE BREYER: All right. Now, how does
23 that differ from what exists in I think every State and
24 certainly in the Federal Rules in Rule 403? The judge
25 may exclude evidence if its relevance is outweighed by

1 its prejudice or misleading the jury. So why, in any
2 instance where you think that this statement about to
3 come in is unreliable for various reasons, you say:
4 Judge, will you please look please look at Rule 403; I
5 have some experts over here and whatever else you want
6 that would show that this is misleading to the jury for
7 all the reasons you have said in your brief, right.

8 So -- so since that is already the law and
9 it does apply to every piece of evidence, including all
10 the things we've been talking about, what is it that you
11 want to change?

12 MR. GUERRIERO: Well, to answer the first
13 part of your question, what's different about this
14 evidence is that --

15 JUSTICE BREYER: I didn't say what's
16 different about it. I'm not looking for a difference.
17 I'm looking -- I'm saying they are all the same. And
18 indeed we do what you want right now. It's called Rule
19 403 in the Federal system. What I'm asking you is what
20 is it you want done, since all you want is the judge to
21 look at it carefully, that is not done at this moment?

22 MR. GUERRIERO: The analysis under 403,
23 which New Hampshire of course has as well, will accord a
24 certain weight and value to the opportunity of counsel
25 to cross-examine the witness and to make arguments to

1 the jury. And unlike any other kind of evidence, this
2 Court has said, precious though it is, the right of
3 cross-examination does not always --

4 JUSTICE BREYER: Well, the judges don't, I'm
5 sure -- I'm not 100 percent sure, you'd have to ask a
6 trial judge. But I am sure there are instances where
7 judges say under Rule 403: I conclude it is misleading
8 and it is prejudicial and it can't be made up for,
9 therefore I exclude it.

10 All right, that happens. Now, since that's
11 what you want the judge to do, I repeat my question:
12 What is the difference between what you're asking for
13 and what already exists in the law? .

14 MR. GUERRIERO: The difference --

15 JUSTICE BREYER: Unless -- well, go ahead.

16 MR. GUERRIERO: I'm sorry.

17 The difference is that under a normal 403
18 analysis, when I told the judge, when I said she never
19 could describe his face, she couldn't even say what
20 clothes he was wearing, the judge will respond to me and
21 say, that's fine. That's all great fodder for
22 cross-examination. But the difference with this kind of
23 evidence is that it's not just ---

24 JUSTICE BREYER: Whoa, wait. Stop you
25 there, because now what you seem to be saying is it

1 isn't the case that you simply want the judge to look at
2 this with care, rather you want the judge to change her
3 result. You want sometimes this to be excluded where
4 under 403 it is sometimes not excluded. Right. Now, I
5 ask -- if that's what you want, that's a different
6 matter. That's a substantive standard. And so you're
7 proposing a different substantive standard and I want to
8 know what it is.

9 MR. GUERRIERO: It's -- it's the standard
10 that this Court has established, if it's reasonably --
11 reasonably likely or substantially likely to lead to a
12 risk of misidentification at trial, very substantially
13 likely.

14 JUSTICE ALITO: That would be really a great
15 change from the way trials are now conducted, wouldn't
16 it. Let me give you this example. A victim is raped
17 and the victim doesn't really have a very good
18 opportunity to see the perpetrator. It's dark, the
19 person has a mask and so forth. A couple of weeks go by
20 and the victim reads an article in the paper that says
21 so-and-so has been arrested for a rape in another part
22 of the city. There is a picture of that person in the
23 paper and the victim says, that's the person who raped
24 me.

25 Now, you want to make it possible for the

1 judge to say that victim may not testify and identify
2 the person that that person -- that the victim says was
3 the perpetrator of the rape, on the ground that the
4 newspaper picture was suggestive, even though there
5 wasn't any police involvement and when you look at all
6 the circumstances, the identification is unreliable.

7 Now, maybe that's a good system, but that is
8 a drastic change, is it not, from the way criminal
9 trials are now conducted?

10 MR. GUERRIERO: Well, it's certainly not the
11 change from what the law is in the Federal circuits that
12 we cited. And I would also point out that in one of the
13 --

14 JUSTICE ALITO: Do you know of cases like
15 that in which the judge has said that eyewitness
16 identification cannot come in?

17 MR. GUERRIERO: In Thigpen v. Cory, which is
18 a Sixth Circuit case, the court said -- in fact they
19 specifically used the phrase "police machinations" --
20 that this did not arise from police machinations. It
21 was basically happenstance in that case that the witness
22 was -- the witness identified the defendant and it was
23 excluded as unreliable.

24 JUSTICE KENNEDY: But we've said in our
25 case, Neil v. Biggers -- that was a rape case and we

1 allowed it. We allowed the eyewitness.

2 MR. GUERRIERO: Well -- and I think the
3 Court said in all its cases, and in particular in
4 Simmons, that each case --

5 JUSTICE KENNEDY: And, in fact we said that
6 it was unnecessarily suggestive, but that it was still
7 reliable.

8 MR. GUERRIERO: And it may be. I mean, it
9 may -- you could have an extremely -- you could have a
10 -- the police could do a show-up intending to produce an
11 ID, but if the witness got a very good look at the
12 person, was calm, was maybe a police officer like in
13 Brathwaite and the court said, we don't care how
14 deliberate this -- and even if there is manipulation, we
15 don't care how much of that there is, we find it's
16 reliable here.

17 JUSTICE KAGAN: Suppose that there was some
18 other category of testimony which proved even more
19 unreliable than the category that you're talking about.
20 Let's say that it turned out study after study after
21 study that jailhouse informants lie. And so the
22 testimony of jailhouse informants is likely to be just
23 completely unreliable, to, you know, double as much as
24 eyewitness testimony. Same rule for that?

25 MR. GUERRIERO: I think it would be a very

1 high burden for the defense to meet there. But if the
2 finding was that there are times that a witness, that --
3 like in the eyewitness situation, where the witness
4 truly believes that they are identifying the right
5 person, but they are actually not and it could result in
6 a miscarriage of justice, then I do believe fundamental
7 fairness requires the Court to say due process doesn't
8 allow that evidence.

9 JUSTICE KAGAN: Okay. Well, now we are
10 talking about, now we are setting up a standard that
11 applies outside eyewitness testimony. It's just
12 testimony that we find to be -- categories of testimony
13 that we find to be extremely unreliable will be subject
14 to this new due process red flag. Is that right?

15 MR. GUERRIERO: Well, I don't think so, Your
16 Honor. But more for a factual reason in that the Court
17 said in 1967 that this is the leading cause of
18 miscarriage of justice. The studies and -- not just
19 studies, but the transcripts and records of actual
20 trials.

21 JUSTICE KAGAN: No, I understand you have
22 very good empirical evidence which should lead us all to
23 wonder about the reliability of eyewitness testimony.
24 I'm just suggesting that eyewitness testimony is not the
25 only kind of testimony which people can do studies on

1 and find that it's more unreliable than you would think.

2 MR. GUERRIERO: Well, maybe if somebody else
3 came along and said, we've done a study and we find this
4 kind of evidence, that in 75 percent of the wrongful
5 convictions, this evidence contributed to the
6 miscarriage of justice, then I would think the Court
7 should take a look at that. But I don't think any other
8 evidence matches that.

9 JUSTICE GINSBURG: What about all the other
10 safeguards that you have? You can ask the judge to tell
11 the jury: Be careful; eyewitness testimony is often
12 unreliable. You can point that out in
13 cross-examination.

14 MR. GUERRIERO: Yes.

15 JUSTICE GINSBURG: All those questions. You
16 can say something about it in your summation to the
17 jury. And as Justice Breyer brought up, you have the
18 evidence rule that says if prejudicial value outweighs
19 probative value that the judge can say, I'm not going to
20 let it in. Why aren't all those safeguards enough?

21 MR. GUERRIERO: If all of those safeguards
22 were enough, even when the police made --

23 JUSTICE GINSBURG: Well, leaving aside the
24 police, because there -- there is an interest in
25 deterrence, in deterring the police from manipulating

1 evidence.

2 MR. GUERRIERO: I don't think deterrence is
3 the primary basis of the court's cases, Your Honor,
4 because the Court has said that if it proves to be
5 reliable, no matter how manipulative the police were,
6 this evidence comes in. So the basis of the rule is not
7 primarily determined -- deterrence; it's the risk of an
8 unfair trial and the risk of a miscarriage of justice.

9 JUSTICE GINSBURG: There is a difference
10 between suggestive and suggested by the police.

11 MR. GUERRIERO: I'm sorry, Your Honor, I --

12 JUSTICE GINSBURG: If the suggestion comes
13 from the police, then the evidence will be excluded. If
14 the suggestion comes from someplace else, unless we
15 change the rule --

16 MR. GUERRIERO: Well I think that that's
17 a --

18 JUSTICE GINSBURG: -- it would be admitted.

19 MR. GUERRIERO: I mean, I think that that's
20 a -- that's a tricky issue to consider, because
21 suggestion coming from the police is different from
22 manipulation. And if -- if the rule is unintended
23 suggestion from the police implicates due process, then
24 Perry was entitled to a due process analysis, because
25 the unintended suggestion here was apparent police

1 suspicion as he stood there.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 MR. GUERRIERO: Thank you.

4 CHIEF JUSTICE ROBERTS: General Delaney.

5 ORAL ARGUMENT OF MICHAEL A. DELANEY

6 ON BEHALF OF THE RESPONDENT

7 MR. DELANEY: Mr. Chief Justice and may it
8 please the Court:

9 An eyewitness identification implicates due
10 process concerns only when the police arrange a
11 confrontation to elicit a witness's identification of a
12 suspect and use unnecessarily suggestive techniques that
13 skew the fact-finding process. The central concern --

14 JUSTICE SOTOMAYOR: Now we've changed the
15 language of Wade when it talks about intentional or
16 unintentional. And you're suggesting that police
17 manipulation always has to be intentionally suggestive?

18 MR. DELANEY: I'm not --

19 JUSTICE SOTOMAYOR: Even if the policeman
20 tells you he wasn't really thinking or focusing on a
21 distinguishing characteristic in the line-up?

22 MR. DELANEY: That may play a role, Justice
23 Sotomayor, but only in a limited sense, and not in the
24 way the Petitioner is suggesting we look at
25 unintentional conduct. First, for the due process

1 inquiry to trigger, there must be an arranged
2 confrontation of a suspect and a witness by the police.

3 JUSTICE SOTOMAYOR: Could you tell me what
4 you think would have happened here? there was a reason
5 the police asked this defendant to stay put. They
6 didn't want him to leave the scene, correct?

7 MR. DELANEY: That -- that's correct.

8 JUSTICE SOTOMAYOR: In your judgment -- I
9 think Justice Kennedy hit the nail on the head. My
10 suspicion is that at some point they would have asked
11 the witnesses in the building and engaged in a show-up.
12 What's so different between intentionally doing the
13 show-up and holding the defendant in the back yard
14 standing there next to a police officer, so that anyone
15 who wants to, like this woman, who wants to find the
16 guy, can just point to that one? What's the difference?

17 MR. DELANEY: The difference in this case is
18 the role that the police played in bringing about
19 potential suggestion under your hypothetical. What the
20 Due Process Clause is concerned about is the role of the
21 police in essentially stacking the deck, putting their
22 thumb on the scale and skewing the fact-finding process.
23 It goes to the intent of the process --

24 JUSTICE SOTOMAYOR: No. I mean, the way not
25 to skew it was to put him in the police car and just let

1 him sit there in the dark. So they intentionally made
2 him wait at the scene of the crime.

3 I'm not talking about whether this was
4 necessary or unnecessary, because I think that a
5 perfectly good argument could be made that the police
6 acted reasonably and necessarily; all right? It makes
7 no sense to move a defendant that far from the scene of
8 a crime if you're not sure he is the one who committed
9 the crime, he or she.

10 But I'm -- I'm going to the question of how
11 do we define, if we write this opinion, manipulation
12 without getting into a mens rea type analysis and adding
13 yet another layer to Biggers.

14 MR. DELANEY: Well, first, I don't think you
15 need to go there in this case. You can simply say that,
16 based on the factual findings of the State court, the
17 police did not induce any type of show-up --

18 JUSTICE SCALIA: But doesn't -- we face that
19 problem anyway, even if we -- whether or not we decide
20 in this case that it doesn't matter that the police
21 manipulated it, we are always going to have the problem
22 of when has there been police manipulation; right?

23 MR. DELANEY: That's correct.

24 JUSTICE SCALIA: I mean, that -- that's not
25 a creation of this -- of this case.

1 MR. DELANEY: That's correct.

2 JUSTICE SCALIA: And I -- I would guess that
3 in the case you're talking about, just telling the
4 person to stay where he is, is not -- now, it would be
5 different if -- if the defendant was -- was caught two
6 blocks away and the police bring him back to the scene
7 of the crime and make him stand there so that the woman
8 can see him from the window. That's quite different.

9 MR. DELANEY: It is quite different. And
10 Stovall tells us that the test is an objective one. We
11 look at the totality of the circumstances to determine
12 whether there has been suggestive conduct.

13 Now, in that regard --

14 CHIEF JUSTICE ROBERTS: When you say
15 that's -- when you say that's different, you're not --
16 you're not suggesting that that would be suggestive, are
17 you?

18 MR. DELANEY: No, I'm not.

19 CHIEF JUSTICE ROBERTS: Because presumably,
20 that's the same argument -- that's for the jury and the
21 counsel. They can say during cross-examination the guy
22 was two blocks away, you know, and -- and wasn't it only
23 because the police brought him back that you -- all of
24 that. I don't see what difference it makes in terms of
25 whether you have a suppression hearing before the trial.

1 MR. DELANEY: That's correct, Mr. Chief
2 Justice. It would not make a difference in that regard.
3 And on the facts of this case, we do have clear factual
4 finding that this police officer in no way -- in no way
5 induced this witness to move towards the window and
6 identify a suspect who just happened to be standing next
7 to a police officer.

8 If the concern under due process in this
9 area has been a deterrence rationale, which this Court
10 has stated in both *Neil v. Biggers* and in *Manson v.*
11 *Brathwaite*, that must be the guiding principle.

12 JUSTICE KAGAN: Well, it's both; right,
13 General Delaney? I mean, the Court has certainly talked
14 about deterrence, but the Court also has very
15 substantial discussions in all of these opinions about
16 reliability. And from the criminal defendant's point of
17 view, it doesn't really much matter whether the
18 unreliability is caused by police conduct or by
19 something else.

20 So -- so tell me a little bit why you think
21 the police conduct here, you know, that has to be there
22 in every case?

23 MR. DELANEY: That is true, Justice Kagan,
24 that -- that the opinions have discussed both issues.
25 And I would offer two considerations. First, to the

1 extent that the courts have talked about reliability as
2 the linchpin or the likelihood of misidentification
3 playing a role, they have only done that read in context
4 within and only after an unnecessarily suggestive
5 circumstance that they had applied.

6 JUSTICE KAGAN: It seems that that's not
7 right. I mean, the reason we want to deter this conduct
8 is because the conduct results in misidentifications and
9 unreliable testimony. That's the reason that deterrence
10 is an important goal, is because this conduct leads to
11 unreliable testimony.

12 MR. DELANEY: That is correct, and if we
13 expand that out and we apply that rationale to the
14 circumstances of a case not involving police activity,
15 we lose that deterrence rationale. There is no
16 deterrence involved in a suggestive circumstance that
17 does not involve the police. Civilians are not going to
18 be repeat players in this system.

19 JUSTICE KENNEDY: And what you're -- what
20 you're saying, I take it, in the answer to Justice
21 Kagan, was that there is really a two-part step. First,
22 was the police procedure unnecessarily suggestive? And
23 then if it was, are there other reliability -- was
24 reliability impaired?

25 So you go -- you ask both questions.

1 MR. DELANEY: And that is the Biggers test.
2 And if we looked at reliability further as sort of the
3 touchstone of our due process inquiry, we would need to
4 misplace completely the role of examining whether the
5 suggestive circumstances are unnecessary. An -- an
6 inquiry into necessity only makes sense in the context
7 of a police investigation or police work. And if we
8 look at Stovall, certainly there is an example of a case
9 that was a show-up, where this Court said that, despite
10 the clearly suggestive circumstances, that show-up was
11 imperative and necessary because the witness may have
12 been about to die.

13 The Court did not conduct a reliability
14 analysis. So if reliability is the linchpin, it puts
15 the Stovall holding in question and really Stovall would
16 be undermined.

17 JUSTICE ALITO: What you're saying -- what
18 you're saying seems to suggest that the rule we're
19 talking about here is really not an aspect of due
20 process per se, but, like the Fourth Amendment
21 exclusionary rule, it's a special due process
22 exclusionary rule that is meant to deter conduct that
23 could result in a constitutional violation.

24 Is that right?

25 MR. DELANEY: I -- I think that's correct,

1 Justice Alito. And the analogy I would use would be to
2 your perjury cases. In Mooney you have clearly set a
3 due process standard that prevents police or prosecutors
4 from knowingly using false evidence. And the concern
5 there is how the police will skew the fact-finding
6 process. Stovall and the identification cases are very
7 similar to that.

8 Our concern in essence is that the police
9 through unnecessary suggestion in that circumstance are
10 going to skew the fact-finding process and in this
11 instance, in essence, create a false or altered memory.

12 JUSTICE ALITO: If -- if the exclusionary
13 aspect of this is not part of due process itself, then
14 doesn't it follow that what due process requires is
15 reliability? So doesn't that mean that the Petitioner's
16 argument is correct, the due process standard is simply
17 reliability, not suggestiveness?

18 MR. DELANEY: It's -- the standard is not
19 reliability, Justice Alito. The standard for due
20 process in this area is the use of orchestrated police
21 suggestion.

22 JUSTICE KENNEDY: What -- what about cases
23 with inflammatory evidence, too many lurid photos or
24 testimony that ignites prejudice in the community?
25 That's -- that's a -- that's reliability.

1 MR. DELANEY: That is, and we have both
2 constitutional and non-constitutional tools and
3 procedures right now to address that. At the base, we
4 require prosecutors under Jackson v. Virginia to have
5 some minimum level of evidence so that a rational trier
6 of fact can establish guilt beyond a reasonable doubt.

7 Above that, under the Sixth Amendment, we
8 provide tools and procedures that allow a defendant to
9 assess the reliability of evidence through
10 cross-examination and summation and the right to
11 counsel. And beyond that, we have non-constitutional
12 sources under the Rules of Evidence that are
13 specifically designed to assess the relevance and the
14 reliability of the evidence. But if we go before that
15 and say that the Due Process Clause after all that has
16 some additional standing in -- in your jurisprudence to
17 assess reliability, we really have gone to a very
18 different place.

19 JUSTICE ALITO: You -- you have two cases.
20 You have Mr. Perry's case and you have another case
21 that's very similar. In fact, it's identical, except
22 that in that instance the police officer talking to the
23 witness said, would you take a look out the window and
24 see if you recognize anybody.

25 Now, from the perspective of the defendants,

1 the cases are -- seem -- as far as whether they get a
2 fair trial, the cases are identical, are they not? The
3 evidence is the same. The suggestiveness is the same.

4 MR DELANEY: No, Justice Alito. Those cases
5 are quite different. And to the extent we did have
6 objective evidence that the police here had in some way
7 brought that woman to the window to, in essence, conduct
8 a show-up, then we may have triggered the first prong of
9 Biggers. And the court would then be required to do two
10 things: First, to determine whether the circumstances
11 were suggestive; and independent of that, also determine
12 whether it was necessary or not, depending on the
13 circumstances of the investigation.

14 So if in fact the police officer had
15 directed the witness to the window, there may be at
16 least grounds for the Biggers and Manson analysis to
17 come into play. These facts are very different from
18 that.

19 JUSTICE KAGAN: Well, I'm not sure you
20 answered Justice Alito's questions about why there
21 should be this difference between these two cases. Now
22 you might want to say that where police conduct is
23 involved, the chances of unreliable identification are
24 greater. Or you may want to say something else. But
25 the question is: If we are focused on reliability, why

1 are those two cases any different?

2 MR. DELANEY: Well, if we do look back to
3 determine whether the circumstances involving the police
4 are any more -- of more serious concern, if we look back
5 to Wade, this Court did talk about the unique role of
6 police suggestion in this context of confrontations.
7 And it specifically focused on the manner and the degree
8 of suggestion in which the manner that police or
9 prosecution present a witness, presents a witness to a
10 suspect, what impact that can have.

11 That unique aspect of police suggestibility,
12 the fact that a police officer when it brings someone
13 forward is going to influence a witness to a high
14 degree, does play a role and is the grounds upon which
15 the Stovall cases have been built.

16 JUSTICE SOTOMAYOR: So tell me -- they gave
17 the hypothetical of the police pointing out the
18 defendant out the window. But earlier you said it might
19 be a different case if the defendant was two blocks away
20 and they brought him back. Same scenario. They do
21 that, bring him back two blocks; make him stand at the
22 scene of the crime; and go upstairs, talk to the woman
23 and she spontaneously says: It's the guy standing over
24 there. That would entitle the defendant to a Wade
25 motion? To a Wade hearing?

1 MR. DELANEY: You would look at the
2 totality of the circumstances. And to the extent from
3 an objective standpoint it could be demonstrated that
4 the police intentionally brought that witness back to
5 the scene --

6 JUSTICE SOTOMAYOR: We are now -- we are now
7 at mens rea again. So what has surprised me about this
8 case is in some ways the way the State court wrote this.
9 Because if the State court had simply said something
10 like, there was no unnecessary show-up here, they were
11 just holding someone until they could figure out what
12 happened, there was no suggestiveness by the police,
13 because the woman pointed out the window, throw out the
14 motion, we wouldn't be here. The argument has become
15 something else now because you're trying to define a
16 level of intent on the part of the police to create
17 unreliability that I think just complicates the inquiry.

18 MR. DELANEY: And I -- and, Justice
19 Sotomayor, I'm not trying to create that complication.
20 And in fact, I would -- I would reference the State
21 court decision a little bit differently. It did ground
22 its holding specifically in a finding that there were no
23 sort of suggestive techniques at play here and no
24 inducement. The trial court order very specifically
25 said it disagrees with the show-up characterization,

1 that the witness had pointed out the Petitioner without
2 any inducement from the police officer. The officer did
3 not direct the witness's attention to the window, and
4 the officer did not ask whether a man in the parking lot
5 was the man who broke into the cars. On those facts,
6 that can dispose of this case without getting into the
7 issue of mens rea.

8 JUSTICE SOTOMAYOR: Well, what's happened is
9 that your briefing and your counter's briefing is
10 broader than I think needs to be on the facts of this
11 case. But putting that aside, you've addressed this as
12 the need for police manipulation. If you define it that
13 way, then we do get into a mens rea discussion rather
14 than what I think Biggers and Wade were about, which is
15 are the circumstances created by the police
16 unnecessarily suggestive.

17 MR. DELANEY: Yes. And I agree with you
18 that the inquiry under the -- under the first prong of
19 Biggers is just that. It's an objective inquiry based
20 on the totality of the circumstances.

21 If there are no further questions, because
22 the defendant's conviction was the product of a fair
23 trial, because the State court properly applied this
24 Court's jurisprudence and precedent in the area of
25 eyewitness identification, and because the Petitioner's

1 proposed rule would markedly expand this Court's due
2 process jurisdiction, we respectfully request that the
3 State court judgment be affirmed.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Ms. Saharsky.

7 ORAL ARGUMENT OF NICOLE A. SAHARSKY

8 ON BEHALF OF THE UNITED STATES,

9 AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

10 MS. SAHARSKY: Mr. Chief Justice, and may it
11 please the Court:

12 A due process inquiry is required only when
13 there is a police-arranged confrontation in order to
14 obtain an identification and then the police
15 unnecessarily suggest that a certain suspect is guilty.
16 And that's because, as the State has said, the Court's
17 central concern in these cases is the State putting a
18 thumb on the scales, gaining an unfair advantage. Just
19 as, as Justice Scalia said, the State can't create a
20 false document and introduce it at trial, it can't
21 manipulate someone's memory and then use that evidence
22 to prove guilt at trial.

23 JUSTICE KAGAN: So do you mean to say,
24 Miss Saharsky, that there can never be a due process
25 violation from the admission of unreliable evidence?

1 Assuming that the State has not created that evidence,
2 has not produced that evidence, but the State knows that
3 the evidence is unreliable or has a very substantial
4 chance of being so, that that can never be a due process
5 violation?

6 MS. SAHARSKY: I'm saying that's where the
7 Court's cases are now. The State can't knowingly
8 introduce perjured testimony, but you're not talking
9 about perjured, knowingly perjured testimony.

10 If the question is just unreliable, the
11 Court has said on numerous occasions -- it's rejected
12 claims like that and said: The Constitution doesn't
13 protect to ensure all evidence is reliable. It provides
14 a process by which the court can test reliability
15 through cross-examination, confrontation, et cetera.
16 The Court has -- And that was in Crawford.

17 The Court has also said -- if I can just add
18 one more thing -- in the due process context, that where
19 the check comes in is in Jackson v. Virginia, that the
20 verdict has to have enough evidence to be supported each
21 element of the crime beyond a reasonable that a rational
22 jury could find it. So that is a due process check.

23 But where the Court's cases stand today, the
24 Court has not found, so far as we can tell, a case where
25 it said that the mere introduction of unreliable

1 evidence would isolate the Due Process Clause. And
2 every time it's been confronted with a claim like that,
3 in Dowling, for example, in Colorado v. Connelly, the
4 Court has rejected such a claim.

5 JUSTICE KAGAN: I'll give you an extreme
6 example. The extreme example is where an identification
7 has been produced by torture, but the torture has been
8 through a non-State actor. Same answer?

9 MS. SAHARSKY: That is an extreme example.
10 There are many reasons why, A, the prosecution would
11 never introduce that kind of evidence to begin with, and
12 B, that there would be other checks on the process in
13 addition to the confrontation and cross-examination
14 types of things that we talked about.

15 There would be a check on the process
16 through Brady and Giglio, for example, that if the
17 government knew that those were the circumstances of the
18 identification, they would have to turn that evidence
19 over to the other side. There would also be checks in
20 terms of the trial process if the government actually
21 put on evidence like that. So it is -- it is very
22 unlikely that such a thing would happen.

23 We are not saying that the Court has to hold
24 in this case that due process could never play a role
25 there. But what we are saying here is this is very

1 routine, run-of-the-mill evidence. Someone who saw what
2 happened and wants to come into court and tell the jury
3 that, and as Justice Kennedy noted, you know, what
4 Petitioner is asking for here is to take all of those
5 away from the jury, really usurping the jury function
6 and having these mini trials where the court itself is
7 trying to decide reliability.

8 JUSTICE KENNEDY: It is interesting. I was
9 trying to find a case where some other class of evidence
10 was excluded because it's unreliability. And in
11 Thompson v. Louisville, as you say, is just insufficient
12 evidence, and that's different. Inflammatory evidence
13 might be an example.

14 MS. SAHARSKY: Yes. I mean, that's
15 different because --

16 JUSTICE KENNEDY: Lurid photos or something
17 like that.

18 MS. SAHARSKY: I mean, there you have, first
19 of all, a separate constitutional provision of an
20 impartial jury, and have you a direct influence upon the
21 jury. So it's not just unreliable evidence being a due
22 process problem. You have this separate Sixth Amendment
23 protection and then you have it acting directly on the
24 jury. So we think that's a different case. In the due
25 process context where the Court's cases have really

1 focused is on the States tilting the scales, the States
2 corrupting the process by knowingly introducing perjured
3 testimony, or by for example refusing to disclose
4 material exculpatory evidence --

5 JUSTICE KENNEDY: I think there were some
6 early cases when fingerprint testimony couldn't come in,
7 when fingerprint technology was just new. I don't know
8 if those were due process or not.

9 MS. SAHARSKY: I can't say. I mean, when
10 you look at the Court's more current cases though, to
11 the extent the Court has heard argument like this
12 evidence is too unreliable, we needed a special
13 Constitutional rule. For example, in *Ventris*, with
14 respect to jail house snitches, the Court rejected that
15 argument. When the Court was told in *Colorado v.*
16 *Connelly* there were concerns about reliability. It
17 said: No, reliability is up to the jury, and it uses
18 the State rules of evidence, and this court's not going
19 to be a rule-making organ for rules of procedure. The
20 Constitution puts in place the various checks on the
21 process: Compulsory process, cross-examination, et
22 cetera. And then outside of that, it's really the role
23 of the States to mold the trial process.

24 JUSTICE ALITO: I was intrigued by what your
25 brief said about Federal Rule of Evidence 403. Do you

1 think that a Federal judge under that rule may exclude
2 the testimony of a witness on the ground that the
3 witness is, in the judgment of the trial judge,
4 completely unbelievable?

5 MS. SAHARSKY: Well, I mean you would need
6 to meet the standard of Rule 403 which is that the --
7 the probative value of the witness would be
8 substantially outweighed by unfair prejudice. I think
9 it is unlikely that evidence would -- of an eyewitness,
10 which the Court has said, particularly in cases like
11 Biggers and Manson, is fairly probative, important
12 evidence; the Court wanted to let it in, even in the
13 circumstances if where you know, the police played a
14 role in manipulation. So probably no, the Court
15 wouldn't -- wouldn't take the --

16 JUSTICE ALITO: But you think in theory that
17 could be done? So if you put on a cooperating witness
18 in the case and this witness has made 100 inconsistent
19 statements previously and has been convicted of perjury,
20 that the judge can just say you can't put that witness
21 on because that person is -- is a liar, and I'm not
22 going to have the witness testify in my courtroom?

23 MS. SAHARSKY: Well, I mean Rule 403 isn't
24 talking about whether evidence is true or false. It's
25 talking about unfair prejudice to the jury, unfair

1 prejudice being -- outweighing the probative value of
2 the testimony. So you know, I think it would be a --
3 call for the judge in that individual case. I don't
4 know that that -- that that kind of argument has been
5 made very often.

6 But it's not just that trial protection;
7 there are numerous trial protections outside of the
8 constitutional limits that the States have put into
9 place specifically with respect to eyewitness
10 identification testimony. For example, there are
11 special jury instructions that most States use, and New
12 Hampshire used special jury instructions here. And
13 there is something that's really notable about these
14 instructions, which is that what Petitioner wants is
15 when the jury has made a determination here, looking at
16 factors like how far was the witness away from the
17 person, how long was it before -- between the crime and
18 when she made the identification -- the jury heard all
19 of those factors, heard argument on it, was instructed
20 on those things and it made a determination; and what
21 Petitioner wants is for a trial court -- this Court,
22 after the fact -- to use those exact same factors and
23 come to a different conclusion.

24 JUSTICE KENNEDY: Was -- was the Daubert
25 case our expert witness case where you have to have a

1 threshold showing? Was that due process or was that
2 just -- that was just rule of evidence.

3 MS. SAHARSKY: Yes, it was just interpreting
4 rule of evidence 70 -- 702. So you know, at the end of
5 the day what -- what Petitioner is really asking for is
6 not some kind of threshold inquiry, but really taking
7 the question of reliability away from the jury, and it
8 would be a very big change in our system. And --

9 CHIEF JUSTICE ROBERTS: Well, we --

10 JUSTICE SOTOMAYOR: -- that already follow
11 your adversary rules. I think it's not just one or two.
12 It's about five or six.

13 The floodgates open there? How many -- how
14 many suppressions of witness identification has occurred
15 in those circuits?

16 MS. SAHARSKY: It is not many, but the
17 principle the Petitioner is arguing for is a significant
18 one. It is that the Due Process Clause protects
19 against -- protects reliability, and I assure you that
20 once this Court says that this is the case, that there
21 will be defendants throughout the United States making
22 arguments about all different kinds of evidence not
23 involving the police being unreliable, and that that all
24 needs to be taken away for -- from the jury, and --

25 CHIEF JUSTICE ROBERTS: Well, suppose the --

1 lie detectors, for example, that's been taken away from
2 the jury on a categorical basis, right?

3 MS. SAHARSKY: Well, there are some State
4 rules of evidence that do that, but I mean, we are
5 talking about as a matter of due process that it is
6 fundamentally unfair at trial to not allow -- this --
7 to -- this evidence if given to the trial would be
8 fundamentally unfair. And you know, the Constitution
9 has enshrined the jury as the fundamental guarantee --
10 the fundamental protector of liberty; and to think that
11 that same Constitution through the Due Process Clause
12 means that run-of-the-mill evidence has to be taken away
13 from the juries, that the trial court can itself look at
14 factors like how good of a view the person had?

15 JUSTICE ALITO: There surely is some minimal
16 due process requirement for the admission of evidence,
17 isn't there? Are you saying there is none? If the
18 State abolished the hearsay rule, could it -- would it
19 not be a violation of due process if the prosecution
20 introduced quadruple hearsay?

21 MS. SAHARSKY: Well, I think that there
22 would initially be a problem with respect to the
23 Confrontation Clause and the court would probably go
24 through the analysis that way. We are not saying that
25 the court --

1 JUSTICE ALITO: Let me give -- you're right.
2 Let me give you another example. Let's say you have
3 --the State puts on a witness who -- who says this
4 person did it because I saw it in my crystal ball.

5 MS. SAHARSKY: Right. And I think that the
6 answer that I would give is the same one to the question
7 Justice Kagan asked, which is where the Court is now,
8 the Court has never that the introduction of some kind
9 of evidence is so unreliable it'd violate due process.
10 In Dowling, for example, it had evidence that --

11 JUSTICE KENNEDY: Is tea leaf reading okay?

12 MS. SAHARSKY: What I'm saying is the Court
13 doesn't need to address that question here. It also
14 doesn't need to foreclose it. But this is very
15 run-of-the-mill evidence. But it doesn't mean that the
16 Court could never find that some kind of evidence is so
17 problematic that the Due Process Clause could preclude
18 its admission, but what we're talking about here is
19 fairly run-of-the-mill evidence.

20 I would just point the Court to the decision
21 in Dowling which was about a prior conviction for which
22 the person had been acquitted; and then that evidence
23 was let in at his trial, and he said that's a problem.
24 That evidence is too unreliable and too prejudicial, and
25 the Court said that's not for the Due Process Clause.

1 The Constitution gives you the process to test evidence.
2 It doesn't ensure that all of the evidence that's going
3 be introduced be reliable. And that's what Petitioner
4 is saying here today, and that would be a very expansive
5 view of the Due Process Clause that just can't be
6 reconciled with cases like Dowling and Colorado v.
7 Connelly.

8 If the Court has no further questions we'd
9 submit that the judgment of the court below should be
10 affirmed.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 Mr. Guerriero, you have 2 minutes remaining.

13 REBUTTAL ARGUMENT OF RICHARD GUERRIERO

14 ON BEHALF OF THE PETITIONER

15 MR. GUERRIERO: I will try to make three
16 points in those 2 minutes.

17 I would ask the Court to consider the
18 circumstances that would be excluded if the Court
19 accepts the rule proposed by the State, that there has
20 to be some intentional manipulation or intentional
21 orchestration. Suppose that rather than the accidental
22 or happenstance show-up we had here, suppose that the
23 accident was in the line-up at the police station, and
24 the police were completely in good faith, getting to the
25 mental state issue, but in spite of their good faith

1 there was suggestion in the line-up. Would the trial
2 court look at that and say even though this was a
3 suggestive line-up we are not going to consider a due
4 process claim because it wasn't intentional or
5 deliberate manipulation? We would suggest that that
6 would be contrary to the principle that the primary evil
7 is the risk of misidentification.

8 Consider another circumstance. Suppose
9 there are two witnesses at the police station, and in
10 spite of the best efforts and good rules of the police,
11 witness one looks at the line-up and then -- or looks at
12 the photo line-up so that they can't be changed, let's
13 say, and leaves the line-up and somehow communicates to
14 witness two, I picked the one on the bottom at the
15 right. I think that's the one. That suggestion would
16 be very powerful from the person who experienced the
17 very same crime.

18 JUSTICE SCALIA: Tell that to the jury.
19 What jury isn't going to be -- I mean the more
20 persuasive your argument is, the more likely it is that
21 a jury will take care of that.

22 MR. GUERRIERO: The problem is that the
23 witnesses who have -- are under the suggestive influence
24 actually believed what they are testifying to, and
25 the -- that's why the Court said in Wade

1 cross-examination for this one kind of evidence -- not
2 floodgates, but this one kind of evidence,
3 cross-examination may not always be enough. The
4 witness's sincerity has a powerful effect on the jury.

5 The last point I want to make is this is not
6 going to open the floodgates, as we say, or create a
7 slew of new claims. Under the Watkins case this Court
8 knows that there -- there is not even required to have a
9 separate hearing on this evidence, and the reason a
10 separate hearing isn't required is because these issues
11 would be fleshed out in front of the jury.

12 This is only a question of what legal
13 standard applies when the judge hears the defendant's
14 objection that this violates due process, there is a --
15 there is a substantial likelihood of misidentification.
16 So it's not any new claims. It's not any separate
17 hearings. It's simply a question of what exactly is the
18 due process rule.

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.
21 The case is submitted.

22 (Whereupon, at 10:58 a.m., the case in the
23 above-entitled matter was submitted.)

24

25

A	46:16 49:15 50:1	area 32:9 35:20 40:24	a.m 1:13 3:2 53:22	brief 20:7 45:25
able 5:24	Alito's 15:6	argue 12:8	B	briefing 40:9,9
abolished 49:18	37:20	argued 12:9	B 8:8 43:12	bring 31:6 38:21
above-entitled 1:11 53:23	allege 4:3 5:19	argues 13:11	back 17:25 29:13	bringing 29:18
accept 6:22,23	allow 25:8 36:8	arguing 48:17	31:6,23 38:2,4	brings 5:12 38:12
accepts 51:19	49:6	argument 1:12	38:20,21 39:4	broader 40:10
accident 51:23	allowed 24:1,1	2:2,5,8,12 3:3,6	ball 50:4	broke 40:5
accidental 14:14	allows 16:25	6:21,22 8:3,8	bank 4:11 11:25	brought 18:24,25
51:21	altered 35:11	17:15 28:5 30:5	bar 12:21	26:17 31:23
accord 20:23	Amendment	31:20 35:16	BARION 1:3	37:7 38:20 39:4
acquitted 50:22	34:20 36:7	39:14 41:7	base 36:3	building 29:11
acted 30:6	44:22	45:11,15 47:4	based 30:16	built 38:15
acting 44:23	amicus 1:21 2:10	47:19 51:13	40:19	burden 25:1
activity 4:4 33:14	41:9	52:20	basically 23:21	C
actor 43:8	amount 17:7	arguments 20:25	basis 27:3,6 49:2	C 2:1 3:1
actual 25:19	analogy 35:1	48:22	behalf 1:16,18	call 47:3
add 42:17	analysis 20:22	arises 13:20	2:4,7,14 3:7	called 20:18
adding 30:12	21:18 27:24	arrange 28:10	28:6 41:8 51:14	calm 24:12
addition 43:13	30:12 34:14	arranged 29:1	believe 25:6	car 29:25
additional 36:16	37:16 49:24	arrested 22:21	believed 52:24	card 11:25
address 36:3	answer 3:25	article 22:20	believes 25:4	care 22:2 24:13
50:13	20:12 33:20	aside 26:23	best 52:10	24:15 52:21
addressed 40:11	43:8 50:6	40:11	beyond 18:16	careful 26:11
admission 41:25	answered 10:5	asked 15:20 29:5	36:6,11 42:21	carefully 20:21
49:16 50:18	37:20	29:10 50:7	big 48:8	cars 40:5
admitted 27:18	answers 10:19	asking 17:8	bigger 14:4,4	case 3:4 5:14,18
advantage 41:18	12:19	20:19 21:12	Biggers 23:25	7:14,15,21,24
adversary 48:11	anybody 36:24	44:4 48:5	30:13 32:10	8:7 13:7 14:12
affirmed 41:3	anyway 17:14	aspect 16:2	34:1 37:9,16	18:18 19:13,16
51:10	30:19	34:19 35:13	40:14,19 46:11	19:19 22:1
agree 19:20	apartment 7:23	38:11	bit 32:20 39:21	23:18,21,25,25
40:17	apparent 27:25	aspects 18:2	Blandon 5:21	24:4 29:17
agreed 6:1	appeal 4:9	assert 18:6	blocks 31:6,22	30:15,20,25
ahead 19:15	APPEARANC...	assess 36:9,13	38:19,21	31:3 32:3,22
21:15	1:14	36:17	borne 18:1,10	33:14 34:8
akin 18:7	appeared 5:20	Assistant 1:19	bottom 52:14	36:20,20 38:19
alibi 17:21	appearing 13:7	assume 8:20	Brady 43:16	39:8 40:6,11
Alito 10:18,22	15:16	16:5	Brathwaite	42:24 43:24
11:1,4,7,10,18	applied 33:5	Assuming 42:1	24:13 32:11	44:9,24 46:18
12:2,25 14:16	40:23	assure 48:19	Breyer 19:12,15	47:3,25,25
22:14 23:14	applies 25:11	ATM 11:25	19:22 20:15	48:20 53:7,21
34:17 35:1,12	53:13	attention 4:7	21:4,15,24	53:22
35:19 36:19	apply 9:14 20:9	40:3	26:17	cases 4:9,19,24
37:4 45:24	33:13	Attorney 1:17		5:10 6:3 14:3

23:14 24:3 27:3 35:2,6,22 36:19 37:1,2,4,21 38:1,15 41:17 42:7,23 44:25 45:6,10 46:10 51:6 categorical 49:2 categories 25:12 category 5:15 6:7 15:3 19:9 24:18,19 caught 31:5 cause 4:25 9:21 12:18 13:21 25:17 caused 32:18 causes 6:11 8:21 9:7,18 central 28:13 41:17 certain 17:7 18:19,20 20:24 41:15 certainly 12:8 16:3 19:24 23:10 32:13 34:8 cetera 42:15 45:22 chance 42:4 chances 37:23 change 20:11 22:2,15 23:8,11 27:15 48:8 changed 28:14 52:12 characteristic 28:21 characterization 39:25 check 42:19,22 43:15 checks 43:12,19 45:20	Chief 3:3,8 15:5 15:19 16:12,16 17:3,18 28:2,4 28:7 31:14,19 32:1 41:5,10 48:9,25 51:11 53:20 Circuit 23:18 circuits 23:11 48:15 circumstance 33:5,16 35:9 52:8 circumstances 4:15 7:15 13:4 23:6 31:11 33:14 34:5,10 37:10,13 38:3 39:2 40:15,20 43:17 46:13 51:18 cited 23:12 city 22:22 Civilians 33:17 claim 5:25 6:18 7:16 18:3,5,6,7 43:2,4 52:4 claims 42:12 53:7,16 class 44:9 Clause 9:1,5,14 29:20 36:15 43:1 48:18 49:11,23 50:17 50:25 51:5 clear 32:3 clearly 34:10 35:2 clothes 21:20 Colorado 43:3 45:15 51:6 combination 5:10 7:18 come 9:20 15:23 18:3 20:3 23:16	37:17 44:2 45:6 47:23 comes 14:11 27:6,12,14 42:19 coming 27:21 committed 30:8 common 11:17 commonly 13:5 communicates 52:13 community 35:24 company's 3:21 completely 24:23 34:4 46:4 51:24 complicates 39:17 complication 39:19 Compulsory 45:21 concern 28:13 32:8 35:4,8 38:4 41:17 concerned 29:20 concerns 28:10 45:16 conclude 21:7 conclusion 47:23 Concord 1:15,17 conduct 8:9 13:3 13:9,20 28:25 31:12 32:18,21 33:7,8,10 34:13 34:22 37:7,22 conducted 22:15 23:9 confessions 18:4 confrontation 28:11 29:2 41:13 42:15 43:13 49:23 confrontations 38:6 confronted 43:2	connection 3:21 Connelly 43:3 45:16 51:7 consider 27:20 51:17 52:3,8 considerations 32:25 considered 14:15 Constitution 42:12 45:20 49:8,11 51:1 constitutional 3:15 34:23 36:2 44:19 45:13 47:8 contact 15:11 contention 5:7 context 14:2 15:10 18:13 33:3 34:6 38:6 42:18 44:25 contrary 52:6 contributed 26:5 convicted 9:7 46:19 conviction 40:22 50:21 convictions 26:5 cooperating 46:17 correct 29:6,7 30:23 31:1 32:1 33:12 34:25 35:16 correctly 17:11 corrupting 45:2 Cory 23:17 counsel 14:23 20:24 28:2 31:21 36:11 41:5 51:11 53:20 Counselor 3:16 counter's 40:9 couple 11:14	22:19 course 16:20 18:2 20:23 court 1:1,12 3:9 4:9,23 5:9 7:1 7:14 11:12 12:21 13:8,11 13:24 14:1 15:15 17:1,25 18:1,9 19:8 21:2 22:10 23:18 24:3,13 25:7,16 26:6 27:4 28:8 30:16 32:9,13,14 34:9 34:13 37:9 38:5 39:8,9,21,24 40:23 41:3,11 42:11,14,16,17 42:24 43:4,23 44:2,6 45:11,14 45:15 46:10,12 46:14 47:21,21 48:20 49:13,23 49:25 50:7,8,12 50:16,20,25 51:8,9,17,18 52:2,25 53:7 courtroom 46:22 courts 33:1 court's 27:3 40:24 41:1,16 42:7,23 44:25 45:10,18 cover 17:16 Crawford 42:16 create 6:10 35:11 39:16,19 41:19 53:6 created 4:16 6:1 6:7 7:9 40:15 42:1 creates 5:13 6:14 creation 30:25 crime 16:17 30:2
--	--	--	---	---

30:8,9 31:7 38:22 42:21 47:17 52:17 criminal 4:19 17:5 23:8 32:16 cross-examina... 21:3,22 26:13 31:21 36:10 42:15 43:13 45:21 53:1,3 cross-examine 20:25 cross-racial 12:3 crystal 50:4 curiae 1:21 2:10 41:9 current 45:10	defense 4:3 13:10 19:10 25:1 define 11:10 30:11 39:15 40:12 defined 13:9 definition 13:2 degree 15:7 38:7 38:14 Delaney 1:17 2:6 28:4,5,7,18,22 29:7,17 30:14 30:23 31:1,9,18 32:1,13,23 33:12 34:1,25 35:18 36:1 37:4 38:2 39:1,18 40:17 deliberate 24:14 52:5 demonstrated 39:3 Department 1:20 departments 16:4 depend 3:17 depending 37:12 deprive 9:11,12 describe 21:19 described 4:24 designed 36:13 despite 34:9 detectors 49:1 deter 33:7 34:22 determination 47:15,20 determine 31:11 37:10,11 38:3 determined 27:7 deterrence 26:25 27:2,7 32:9,14 33:9,15,16 deterring 26:25 die 34:12	differ 19:23 difference 20:16 21:12,14,17,22 27:9 29:16,17 31:24 32:2 37:21 different 4:17 11:15 20:13,16 22:5,7 27:21 29:12 31:5,8,9 31:15 36:18 37:5,17 38:1,19 44:12,15,24 47:23 48:22 differently 39:21 dinner 18:21,21 direct 4:6 40:3 44:20 directed 37:15 directly 44:23 disagree 6:25 8:11 16:1 disagrees 39:25 disclose 45:3 discussed 32:24 discussion 40:13 discussions 32:15 dispose 40:6 distinct 8:14 distinction 10:12 distinguish 14:17 14:18 distinguishing 28:21 DNA 5:1 18:6 document 41:20 doing 29:12 door 9:4 double 24:23 doubt 36:6 Dowling 43:3 50:10,21 51:6 drastic 23:8 dubious 10:23	due 3:13 5:24 6:18 7:16,19 8:3 9:1,5,13 10:6 11:22 12:9 14:9 25:7,14 27:23,24 28:9 28:25 29:20 32:8 34:3,19,21 35:3,13,14,16 35:19 36:15 41:1,12,24 42:4 42:18,22 43:1 43:24 44:21,24 45:8 48:1,18 49:5,11,16,19 50:9,17,25 51:5 52:3 53:14,18 Dunnigan 4:9 11:24 D.C 1:8,20	29:21 establish 36:6 established 22:10 et 42:15 45:21 evaluate 17:1 evaluation 3:14 everybody 17:6 evidence 4:19,22 6:8,8,15 7:17 7:18 9:1,3,6,8,8 9:23 12:22 14:9 18:3,5,6,8 19:9 19:25 20:9,14 21:1,23 25:8,22 26:4,5,8,18 27:1,6,13 35:4 35:23 36:5,9,12 36:14 37:3,6 41:21,25 42:1,2 42:3,13,20 43:1 43:11,18,21 44:1,9,12,12 44:21 45:4,12 45:18,25 46:9 46:12,24 48:2,4 48:22 49:4,7,12 49:16 50:9,10 50:15,16,19,22 50:24 51:1,2 53:1,2,9 evidentiary 9:15 evil 52:6 exact 47:22 exactly 4:10 5:9 6:20 53:17 examining 34:4 example 6:18 11:14,23 14:20 22:16 34:8 43:3 43:6,6,9,16 44:13 45:3,13 47:10 49:1 50:2 50:10 examples 11:13
<hr/> D <hr/> D 3:1 danger 3:11,13 13:25 dangers 18:10 dark 22:18 30:1 Daubert 47:24 day 48:5 decide 30:19 44:7 decision 39:21 50:20 deck 29:21 defendant 7:15 8:2,8,20,23 9:7 9:10,13,20,24 9:25 10:4,6 11:16 13:7 15:16 17:1 23:22 29:5,13 30:7 31:5 36:8 38:18,19,24 defendants 36:25 48:21 defendant's 32:16 40:22 53:13			<hr/> E <hr/> E 2:1 3:1,1 earlier 38:18 early 45:6 effect 53:4 effectively 11:13 efforts 52:10 eight 16:9 either 7:16 element 42:21 elicit 28:11 emergency 8:16 empirical 25:22 engaged 29:11 enshrined 49:9 ensure 42:13 51:2 entitle 38:24 entitled 27:24 ESQ 1:15,17,19 2:3,6,9,13 essence 35:8,11 37:7 essentially 13:8	

11:22 15:15 exclude 6:4 8:21 19:25 21:9 46:1 excluded 6:16 8:24,25 9:3,7 9:24 10:24 12:15,21,22 14:9 22:3,4 23:23 27:13 44:10 51:18 exclusion 16:24 exclusionary 34:21,22 35:12 exculpatory 45:4 exigency 8:16 exists 19:23 21:13 exonerations 5:1 expand 33:13 41:1 expansive 51:4 experience 5:1 experienced 52:16 expert 12:7 47:25 experts 20:5 explanation 14:25 extent 33:1 37:5 39:2 45:11 extreme 43:5,6,9 extremely 24:9 25:13 eyewitness 3:10 4:16,22 5:5,10 5:15 6:5,6,13 6:13,22,24 7:2 7:10 8:19 10:22 12:12,18 14:9 14:19,21 17:15 18:7 23:15 24:1 24:24 25:3,11 25:23,24 26:11 28:9 40:25 46:9	47:9 <hr/> F face 21:19 30:18 fact 4:9,24 5:1,21 12:21 16:2 17:25 23:18 24:5 36:6,21 37:14 38:12 39:20 47:22 factors 47:16,19 47:22 49:14 facts 32:3 37:17 40:5,10 factual 25:16 30:16 32:3 fact-finding 28:13 29:22 35:5,10 fair 8:15 37:2 40:22 fairly 8:14 46:11 50:19 fairness 7:20 25:7 faith 51:24,25 false 18:4 35:4 35:11 41:20 46:24 familiar 16:4 far 30:7 37:1 42:24 47:16 favor 8:19 10:6,8 Federal 4:9 19:24 20:19 23:11 45:25 46:1 figure 39:11 filed 14:25 find 24:15 25:12 25:13 26:1,3 29:15 42:22 44:9 50:16 finding 25:2 32:4 39:22	findings 30:16 fine 21:21 fingerprint 45:6 45:7 first 3:4 12:20 13:24 20:12 28:25 30:14 32:25 33:21 37:8,10 40:18 44:18 five 48:12 flag 15:18 16:25 25:14 fleshed 53:11 floodgates 48:13 53:2,6 focused 13:21,24 37:25 38:7 45:1 focusing 14:1 28:20 fodder 21:21 follow 35:14 48:10 following 15:6 17:4 food 18:25 foreclose 50:14 forensic 18:4 forth 22:19 forward 38:13 Foster 11:14 found 42:24 Fourth 34:20 frank 14:25 friends 18:21 front 53:11 function 44:5 fundamental 7:19 25:6 49:9 49:10 fundamentally 49:6,8 further 11:3 13:14 34:2 40:21 51:8	<hr/> G G 3:1 gaining 41:18 General 1:17,20 28:4 32:13 generally 14:5 14:10 getting 30:12 40:6 51:24 Giglio 43:16 Ginsburg 5:4,14 10:5,8,11,15 10:16 14:17 15:2 26:9,15,23 27:9,12,18 give 13:2 22:16 43:5 50:1,2,6 given 11:13 15:15 49:7 gives 51:1 go 11:3 18:21 19:15 21:15 22:19 30:15 33:25 36:14 38:22 49:23 goal 33:10 goes 17:7 18:16 29:23 going 8:1,24 11:23 13:14 16:8 26:19 30:10,21 33:17 35:10 38:13 45:18 46:22 51:2 52:3,19 53:6 good 14:24 19:3 22:17 23:7 24:11 25:22 30:5 49:14 51:24,25 52:10 government 43:17,20 great 21:21 22:14	greater 15:22 37:24 greatest 5:13 ground 9:19 12:4 12:10 23:3 39:21 46:2 grounds 9:15 12:7 37:16 38:14 guarantee 49:9 Guerriero 1:15 2:3,13 3:5,6,8 3:18,22,25 4:14 4:21 5:8,18 6:17,25 7:7,13 8:11,25 9:5,10 10:1,7,10,14 10:21,25 11:2,6 11:9,12,21 12:6 12:19 13:3,23 14:7,23 15:4,14 16:1,15,23 17:17,24 18:14 19:2,7,13,18 20:12,22 21:14 21:16 22:9 23:10,17 24:2,8 24:25 25:15 26:2,14,21 27:2 27:11,16,19 28:3 51:12,13 51:15 52:22 guess 17:4 31:2 guiding 32:11 guilt 36:6 41:22 guilty 41:15 guy 13:13 15:25 29:16 31:21 38:23 <hr/> H Hampshire 1:6 1:15,18 3:4 20:23 47:12 handled 7:17
--	---	--	--	---

happen 43:22	23:16 28:9,11	initially 49:22	invoked 9:19	47:11,12,15,18
happened 18:22	35:6 37:23	inquiry 29:1 34:3	involve 33:17	48:7,24 49:2,9
29:4 32:6 39:12	40:25 41:14	34:6 39:17	involved 4:5,10	52:18,19,21
40:8 44:2	43:6,18 47:10	40:18,19 41:12	11:14,19,20	53:4,11
happens 21:10	47:18 48:14	48:6	14:12 33:16	justice 1:20 3:3,8
happenstance	identifications	instance 4:18	37:23	3:12,16,19,23
23:21 51:22	14:5	20:2 35:11	involvement	4:14,25 5:4,14
head 29:9	identified 23:22	36:22	3:17 11:8 14:13	6:3,20 7:4,8,21
hear 3:3	identify 6:11	instances 21:6	23:5	8:18 9:2,6,17
heard 5:25 45:11	23:1 32:6	instituted 18:13	involving 33:14	10:2,5,8,11,14
47:18,19	identifying 25:4	instruct 16:4	38:3 48:23	10:16,17,18,22
hearing 31:25	ignites 35:24	instructed 47:19	isolate 43:1	11:1,4,7,10,18
38:25 53:9,10	impact 38:10	instruction 12:7	issue 27:20 40:7	12:2,11,25
hearings 53:17	impaired 6:5	instructions 16:7	51:25	13:17,17 14:1
hears 53:13	33:24	47:11,12,14	issues 18:4,4	14:16,17 15:2,5
hearsay 49:18	impairs 6:21	insufficient	32:24 53:10	15:6,19 16:12
49:20	impartial 44:20	44:11	it'd 50:9	16:16 17:3,18
height 5:12	imperative 34:11	intending 24:10		18:12,15 19:3
helps 9:24	implicated 7:19	intent 29:23	J	19:12,15,22
high 12:21 19:20	implicates 3:13	39:16	Jackson 36:4	20:15 21:4,15
25:1 38:13	27:23 28:9	intentional 5:19	42:19	21:24 22:14
hit 29:9	important 17:24	28:15 51:20,20	jail 45:14	23:14,24 24:5
hold 43:23	33:10 46:11	52:4	jailhouse 24:21	24:17 25:6,9,18
holding 29:13	improper 8:9	intentionally	24:22	25:21 26:6,9,15
34:15 39:11,22	including 20:9	28:17 29:12	judge 5:25 19:11	26:17,23 27:8,9
Honor 3:18 4:21	inconsistent	30:1 39:4	19:17,18,24	27:12,18 28:2,4
5:8 6:25 8:11	46:18	interest 26:24	20:4,20 21:6,11	28:7,14,19,22
12:20 16:2 19:8	independent	interesting 44:8	21:18,20 22:1,2	29:3,8,9,24
25:16 27:3,11	37:11	interfered 8:4	23:1,15 26:10	30:18,24 31:2
house 45:14	individual 17:19	interpreting 48:3	26:19 46:1,3,20	31:14,19 32:2
hurts 9:24	47:3	intrigued 45:24	47:3 53:13	32:12,23 33:6
husband's 14:18	induce 30:17	introduce 41:20	judges 21:4,7	33:19,20 34:17
14:22	induced 32:5	42:8 43:11	judgment 29:8	35:1,12,19,22
hypothetical	inducement	introduced 4:19	41:3 46:3 51:9	36:19 37:4,19
29:19 38:17	39:24 40:2	8:21,22 49:20	juries 49:13	37:20 38:16
	inflammatory	51:3	jurisdiction 41:2	39:6,18 40:8
I	35:23 44:12	introducing 45:2	jurisprudence	41:5,10,19,23
ID 4:13 24:11	influence 3:11	introduction	36:16 40:24	43:5 44:3,8,16
identical 36:21	4:2,3,6 5:11	42:25 50:8	jury 12:7,14,14	45:5,24 46:16
37:2	38:13 44:20	investigation	18:17 19:4,5	47:24 48:9,10
identification	52:23	15:11 16:20	20:1,6 21:1	48:25 49:15
3:10,15 4:17,22	informants 24:21	34:7 37:13	26:11,17 31:20	50:1,7,11 51:11
5:11 7:2 8:12	24:22	investigator 3:20	42:22 44:2,5,5	52:18 53:20
12:3,13,18	infringing 18:17	3:21 4:10,11	44:20,21,24	
16:19 18:7 23:6	inherently 9:23	11:24	45:17 46:25	K

Kagan 13:17 14:1 24:17 25:9 25:21 32:12,23 33:6,21 37:19 41:23 43:5 50:7	25:22 leading 4:25 25:17 leads 33:10 leaf 50:11 leave 12:14 29:6 leaves 52:13 leaving 26:23 left 6:9 legal 53:12 let's 6:8,8 8:20 24:20 50:2 52:12 level 11:23 15:15 36:5 39:16 liar 46:21 liberty 9:11,13 49:10 lie 24:21 49:1 light 19:3 likelihood 33:2 53:15 limit 10:3 limited 4:15 6:6 28:23 limits 47:8 linchpin 33:2 34:14 line-up 8:13,14 11:16 13:13 15:17 16:6,14 28:21 51:23 52:1,3,11,12 52:13 line-ups 16:8 little 32:20 39:21 long 17:18 47:17 look 4:18 7:25,25 8:2 14:3 16:11 17:25 19:11,19 20:4,4,21 22:1 23:5 24:11 26:7 28:24 31:11 34:8 36:23 38:2 38:4 39:1 45:10	49:13 52:2 looked 5:22 34:2 looking 20:16,17 47:15 looks 13:11 52:11,11 lose 33:15 lot 17:11 40:4 Louisville 44:11 lurid 35:23 44:16 <hr/> M <hr/> machinations 23:19,20 magic 12:16 main 13:25 making 48:21 man 4:7 7:25 8:1 8:5,10 13:5,9 13:16 15:17,21 15:23 40:4,5 manipulate 41:21 manipulated 30:21 manipulating 26:25 manipulation 5:17,19 24:14 27:22 28:17 30:11,22 40:12 46:14 51:20 52:5 manipulative 27:5 manner 6:10 38:7,8 Manson 32:10 37:16 46:11 markedly 41:1 mask 22:19 matches 26:8 material 45:4 matter 1:11 9:21 22:6 27:5 30:20	32:17 49:5 53:23 matters 12:17 meal 18:23 mean 7:4 11:11 12:11,22 13:1,2 14:16 19:8 24:8 27:19 29:24 30:24 32:13 33:7 35:15 41:23 44:14,18 45:9 46:5,23 49:4 50:15 52:19 means 49:12 meant 34:22 media 3:23 meet 25:1 46:6 memory 35:11 41:21 mens 30:12 39:7 40:7,13 mental 51:25 menu 18:24 mere 42:25 message 6:9 MICHAEL 1:17 2:6 28:5 midway 18:23 mini 44:6 minimal 49:15 minimum 36:5 minute 17:10,23 minutes 17:9,20 51:12,16 miscarriage 3:12 25:6,18 26:6 27:8 miscarriages 4:25 misidentification 3:12,13 12:24 22:12 33:2 52:7 53:15 misidentificati...	33:8 misleading 20:1 20:6 21:7 misplace 34:4 mix 10:3 mold 45:23 moment 20:21 Mooney 35:2 motion 14:19 15:1 38:25 39:14 move 12:7 14:22 14:24 30:7 32:5 multiple 16:8 mustache 13:14 <hr/> N <hr/> N 2:1,1 3:1 nail 29:9 necessarily 4:8 30:6 necessary 30:4 34:11 37:12 necessity 34:6 need 13:1 30:15 34:3 40:12 46:5 50:13,14 needed 11:1,4,5 45:12 needs 40:10 48:24 Neil 23:25 32:10 never 21:18 41:24 42:4 43:11,24 50:8 50:16 new 1:6,15,17 3:4 20:23 25:14 45:7 47:11 53:7 53:16 news 3:23 newspaper 23:4 NICOLE 1:19 2:9 41:7 nonpolice 11:21
---	--	--	---	--

14:11 non-constitutio... 36:2,11 non-State 13:20 43:8 normal 21:17 normally 12:13 notable 47:13 noted 44:3 November 1:9 numerous 42:11 47:7	orchestrated 35:20 orchestration 5:19 51:21 order 18:25 39:24 41:13 organ 45:19 ought 9:23 outside 25:11 45:22 47:7 outweighed 19:25 46:8 outweighing 47:1 outweighs 26:18	16:21 17:20 22:19,22,23 23:2,2 24:12 25:5 31:4 46:21 47:17 49:14 50:4,22 52:16 person's 17:21 perspective 36:25 persuasive 52:20 Petitioner 1:4,16 2:4,14 3:7 28:24 40:1 44:4 47:14,21 48:5 48:17 51:3,14 Petitioner's 35:15 40:25 phone 6:9 photo 8:13 52:12 photograph 13:6 photos 4:12 35:23 44:16 phrase 23:19 picked 15:8 16:21 52:14 picture 3:20,24 22:22 23:4 piece 20:9 place 5:15 36:18 45:20 47:9 play 28:22 37:17 38:14 39:23 43:24 played 29:18 46:13 players 33:18 playing 33:3 please 3:9 17:1 20:4,4 28:8 41:11 plus 5:11 point 12:12 13:4 17:13 18:8 23:12 26:12 29:10,16 32:16	50:20 53:5 pointed 39:13 40:1 pointing 38:17 points 51:16 police 3:17,21 4:4,5,16 5:16 5:20 6:5,7,10 6:15,19 7:9,11 7:22 8:3,6,9,12 11:8,16,19,19 13:18 14:2,12 15:23 16:3,4,17 18:13 23:5,19 23:20 24:10,12 26:22,24,25 27:5,10,13,21 27:23,25 28:10 28:16 29:2,5,14 29:18,21,25 30:5,17,20,22 31:6,23 32:4,7 32:18,21 33:14 33:17,22 34:7,7 35:3,5,8,20 36:22 37:6,14 37:22 38:3,6,8 38:11,12,17 39:4,12,16 40:2 40:12,15 41:14 46:13 48:23 51:23,24 52:9 52:10 policeman 28:19 police's 5:17 police-arranged 41:13 position 3:17 5:20 14:7 possible 22:25 potential 29:19 powerful 52:16 53:4 precedent 40:24 precious 21:2	preclude 50:17 prejudice 20:1 35:24 46:8,25 47:1 prejudicial 21:8 26:18 50:24 present 38:9 presenting 13:6 presents 3:11 38:9 presumably 31:19 pretesting 5:6 prevents 35:3 previously 46:19 primarily 27:7 primary 27:3 52:6 principle 32:11 48:17 52:6 prior 50:21 private 3:19 4:10 4:11 11:24 probably 4:25 46:14 49:23 probative 26:19 46:7,11 47:1 problem 14:4,4 30:19,21 44:22 49:22 50:23 52:22 problematic 50:17 procedure 8:13 8:14 16:3 33:22 45:19 procedures 18:13 36:3,8 process 3:14 5:25 6:18 7:16 7:19 8:3 9:1,5 9:13 10:6 11:22 12:10 14:9 25:7 25:14 27:23,24 28:10,13,25
O O 2:1 3:1 objection 9:16 53:14 objective 31:10 37:6 39:3 40:19 obtain 41:14 obviously 9:11 occasions 42:11 occurred 48:14 offer 32:25 officer 24:12 29:14 32:4,7 36:22 37:14 38:12 40:2,2,4 Oh 18:22 okay 8:23 16:8 25:9 50:11 once 10:2,2 13:18,19 48:20 one-way 9:4 10:13 open 48:13 53:6 opinion 30:11 opinions 32:15 32:24 opportunity 20:24 22:18 opposed 12:17 13:21 oral 1:11 2:2,5,8 3:6 28:5 41:7	P P 3:1 PAGE 2:2 paper 22:20,23 parking 40:4 part 5:17 20:13 22:21 35:13 39:16 particular 18:10 24:3 particularly 46:10 people 17:8,9,9,9 17:12 25:25 percent 21:5 26:4 perfectly 30:5 perjured 42:8,9,9 45:2 perjury 35:2 46:19 perpetrator 22:18 23:3 Perry 1:3 3:4 5:21 27:24 Perry's 36:20 person 11:17 12:1,16 13:6 15:8,10,11,13 15:24 16:18,18			

29:20,22,23 32:8 34:3,20,21 35:3,6,10,13 35:14,16,20 36:15 41:2,12 41:24 42:4,14 42:18,22 43:1 43:12,15,20,24 44:22,25 45:2,8 45:21,21,23 48:1,18 49:5,11 49:16,19 50:9 50:17,25 51:1,5 52:4 53:14,18 produce 24:10 produced 42:2 43:7 product 40:22 professor 17:6 promptly 8:14 prong 37:8 40:18 proper 16:3 properly 40:23 proposed 41:1 51:19 proposing 22:7 prosecution 7:17 8:22 18:19 38:9 43:10 49:19 prosecutors 35:3 36:4 protect 42:13 protection 44:23 47:6 protections 47:7 protector 49:10 protects 48:18 48:19 prove 41:22 proved 24:18 proves 27:4 provide 36:8 provides 42:13 province 18:17 19:5	provision 44:19 psychological 18:11 publishes 3:24 put 15:2 29:5,25 43:21 46:17,20 47:8 puts 34:14 45:20 50:3 putting 29:21 40:11 41:17 <hr/> Q <hr/> quadruple 49:20 qualify 12:3 13:16 question 13:18 15:7 16:2 20:13 21:11 30:10 34:15 37:25 42:10 48:7 50:6 50:13 53:12,17 questions 26:15 33:25 37:20 40:21 51:8 quiet 17:6 quite 31:8,9 37:5 <hr/> R <hr/> R 3:1 raise 7:15 9:16 raises 15:18 16:25 randomly 15:9 16:22 rape 22:21 23:3 23:25 raped 22:16,23 rare 19:19 rational 36:5 42:21 rationale 18:16 32:9 33:13,15 rea 30:12 39:7 40:7,13	read 33:3 reading 50:11 reads 22:20 really 6:6,12 17:22 22:14,17 28:20 32:17 33:21 34:15,19 36:17 44:5,25 45:22 47:13 48:5,6 reason 10:3 13:24 25:16 29:4 33:7,9 53:9 reasonable 36:6 42:21 reasonably 22:10,11 30:6 reasons 20:3,7 43:10 REBUTTAL 2:12 51:13 recognize 36:24 recognized 4:23 18:9 reconciled 51:6 records 25:19 red 15:18 16:25 25:14 red-flag 19:16 red-flagged 19:10,10 reference 39:20 refusing 45:3 regard 31:13 32:2 regarding 18:6 rejected 42:11 43:4 45:14 relate 14:6 relevance 19:25 36:13 reliability 3:14 4:2 5:6 25:23 32:16 33:1,23	33:24 34:2,13 34:14 35:15,17 35:19,25 36:9 36:14,17 37:25 42:14 44:7 45:16,17 48:7 48:19 reliable 4:20 12:5 24:7,16 27:5 42:13 51:3 remaining 51:12 remember 17:4 remembering 17:11 reminisce 18:18 render 6:15 repeat 13:17 21:11 33:18 request 41:2 require 6:4 8:17 11:8 36:4 required 4:8 37:9 41:12 53:8,10 requirement 49:16 requires 3:14 25:7 35:14 respect 45:14 47:9 49:22 respectfully 41:2 respond 21:20 Respondent 1:18 1:22 2:7,11 28:6 41:9 result 22:3 25:5 34:23 results 16:24 33:8 retry 12:16 reversal 6:4 RICHARD 1:15 2:3,13 3:6 51:13 right 8:4 10:7,10 10:14,21,25	11:2,6,8,9,21 14:9 15:14 16:15 17:6 19:2 19:22 20:7,18 21:2,10 22:4 25:4,14 30:6,22 32:12 33:7 34:24 36:3,10 49:2 50:1,5 52:15 rightly 4:4,5 rise 11:22 rises 15:15 risk 5:13 6:1,14 22:12 27:7,8 52:7 risking 8:8 ROBERTS 3:3 15:5,19 16:12 16:16 17:3,18 28:2,4 31:14,19 41:5 48:9,25 51:11 53:20 role 28:22 29:18 29:20 33:3 34:4 38:5,14 43:24 45:22 46:14 routine 44:1 ruins 17:21 rule 19:24 20:4 20:18 21:7 24:24 26:18 27:6,15,22 34:18,21,22 41:1 45:13,25 46:1,6,23 48:2 48:4 49:18 51:19 53:18 rules 9:1,3 19:24 36:12 45:18,19 48:11 49:4 52:10 rule-making 45:19 rulings 7:18
---	--	--	---	---

run-of-the-mill 44:1 49:12 50:15,19	se 14:6 34:20 seconds 17:23 see 4:19 9:17,18 15:25 16:11,18 22:18 31:8,24 36:24 seen 5:2 18:24 sense 9:14 28:23 30:7 34:6 separate 6:18 12:6,9 44:19,22 53:9,10,16 serious 38:4 set 12:21 16:11 35:2 sets 16:9 setting 25:10 shop 17:20 shorter 17:11 show 8:23 16:9 20:6 showed 4:11 showing 11:24 13:5 48:1 shown 5:3 12:4 shows 3:20 show-up 8:15,17 11:13,14 15:16 24:10 29:11,13 30:17 34:9,10 37:8 39:10,25 51:22 show-ups 11:23 side 9:9 43:19 significance 4:1 significant 48:17 similar 35:7 36:21 similarly 6:23 Simmons 24:4 simple 10:19 simply 14:23 22:1 30:15 35:16 39:9 53:17	sincerity 53:4 single 13:5 singled 18:9 sit 30:1 situation 14:18 16:13 25:3 situations 11:19 six 48:12 Sixth 23:18 36:7 44:22 skew 28:13 29:25 35:5,10 skewing 29:22 slew 53:7 slight 13:12 snitches 45:14 Solicitor 1:19 solved 7:24 somebody 8:23 18:3,5 26:2 someone's 41:21 someplace 27:14 sorry 19:14 21:16 27:11 sort 5:12 34:2 39:23 Sotomayor 3:16 3:19,23 28:14 28:19,23 29:3,8 29:24 38:16 39:6,19 40:8 48:10 source 14:12 sources 36:12 so-and-so 22:21 special 6:14,24 7:2 19:9 34:21 45:12 47:11,12 specifically 23:19 36:13 38:7 39:22,24 47:9 spite 51:25 52:10 spontaneously 38:23	stacking 29:21 stand 31:7 38:21 42:23 standard 12:22 16:7 19:21 22:6 22:7,9 25:10 35:3,16,18,19 46:6 53:13 standards 17:2 standing 29:14 32:6 36:16 38:23 standpoint 39:3 starts 17:7 state 9:11,12,15 9:18,21 10:3,9 19:23 30:16 39:8,9,20 40:23 41:3,16,17,19 42:1,2,7 45:18 49:3,18 50:3 51:19,25 stated 32:10 statement 14:22 20:2 statements 46:19 States 1:1,12,21 2:10 41:8 45:1 45:1,23 47:8,11 48:21 station 51:23 52:9 stay 29:5 31:4 step 33:21 stolen 11:25 stood 28:1 Stop 21:24 Stovall 31:10 34:8,15,15 35:6 38:15 street 10:16 15:9 stress 19:1 studies 12:4 18:11 25:18,19	25:25 study 17:22,22 24:20,20,21 26:3 subject 25:13 submit 51:9 submitted 53:21 53:23 subsequent 4:24 5:10 substantial 32:15 42:3 53:15 substantially 12:23 19:20 22:11,12 46:8 substantive 22:6 22:7 sufficient 13:15 suggest 3:22 4:21 34:18 41:15 52:5 suggested 4:1 27:10 suggestibility 38:11 suggesting 25:24 28:16,24 31:16 suggestion 5:16 13:12,15 14:11 15:21 16:24,25 27:12,14,21,23 27:25 29:19 35:9,21 38:6,8 52:1,15 suggestive 3:11 4:15 5:11,16 6:1 13:11 16:21 23:4 24:6 27:10 28:12,17 31:12 31:16 33:4,16 33:22 34:5,10 37:11 39:23 40:16 52:3,23 suggestiveness 6:7,10 7:11
--	--	---	---	---

8:20 11:5,7,11 11:15,22 12:17 13:1,19,19,21 14:2,6,10,14 14:21 15:8,12 35:17 37:3 39:12 summation 26:16 36:10 supported 42:20 supporting 1:21 2:11 41:9 suppose 6:6 7:21 24:17 48:25 51:21,22 52:8 suppress 14:19 14:22,24 15:1 suppression 31:25 suppressions 48:14 Supreme 1:1,12 sure 12:8 21:5,5 21:6 30:8 37:19 surely 49:15 surprised 39:7 surveillance 4:12 suspect 5:22 13:6,8 16:6,9 16:10 28:12 29:2 32:6 38:10 41:15 suspicion 4:5 5:13,23 28:1 29:10 system 20:19 23:7 33:18 48:8	taken 18:25 48:24 49:1,12 talk 38:5,22 talked 7:22 32:13 33:1 43:14 talking 13:18,19 16:14,16 20:10 24:19 25:10 30:3 31:3 34:19 36:22 42:8 46:24,25 49:5 50:18 talks 28:15 tea 50:11 teach 19:4 techniques 28:12 39:23 technology 45:7 tell 8:1 13:4 26:10 29:3 32:20 38:16 42:24 44:2 52:18 telling 31:3 tells 28:20 31:10 term 18:5 terms 31:24 43:20 test 31:10 34:1 42:14 51:1 testify 23:1 46:22 testifying 52:24 testimony 5:5,11 5:15 6:5,6,13 6:13 7:3,10,10 7:10 8:19 10:20 10:22 14:20,21 14:24 15:1 17:15 24:18,22 24:24 25:11,12 25:12,23,24,25 26:11 33:9,11 35:24 42:8,9	45:3,6 46:2 47:2,10 Thank 28:2,3 41:4,5 51:11 53:19,20 theory 9:20 46:16 Thigpen 23:17 thing 7:23 42:18 43:22 things 12:20 13:10 17:5 20:10 37:10 43:14 47:20 think 4:23 5:9 6:3 6:5,12,14,17 7:1,11,12,13 7:14,24 9:2 11:12 13:15 14:7 15:22,24 16:3,6,20 17:12 17:24 18:5 19:7 19:8,23 20:2 24:2,25 25:15 26:1,6,7 27:2 27:16,19 29:4,9 30:4,14 32:20 34:25 39:17 40:10,14 44:24 45:5 46:1,8,16 47:2 48:11 49:10,21 50:5 52:15 thinking 28:20 thinks 3:24 Thompson 44:11 three 16:9 51:15 threshold 48:1,6 throw 7:12 39:13 thumb 29:22 41:18 tilting 45:1 time 4:3,24 17:7 17:8 19:1 43:2 times 25:2	today 3:4 42:23 51:4 told 21:18 45:15 tools 36:2,8 torture 43:7,7 totality 31:11 39:2 40:20 touchstone 34:3 transcripts 25:19 trial 9:13 13:11 14:23 17:1 19:11,18 21:6 22:12 27:8 31:25 37:2 39:24 40:23 41:20,22 43:20 45:23 46:3 47:6 47:7,21 49:6,7 49:13 50:23 52:1 trials 22:15 23:9 25:20 44:6 tricky 27:20 tried 18:6 trier 36:5 trigger 29:1 triggered 37:8 true 32:23 46:24 truly 25:4 try 51:15 trying 9:11,12 17:14 39:15,19 44:7,9 turn 43:18 turned 24:20 turns 17:10,21 two 12:19 31:5 31:22 32:25 36:19 37:9,21 38:1,19,21 48:11 52:9,14 two-part 3:25 33:21 type 16:19 30:12 30:17	types 43:14 <hr/> U <hr/> unbelievable 7:9 46:4 undermined 34:16 understand 12:25 25:21 unfair 27:8 41:18 46:8,25,25 49:6 49:8 unintended 27:22,25 unintentional 14:13 28:16,25 unique 3:11 4:22 38:5,11 United 1:1,12,21 2:10 41:8 48:21 unnecessarily 24:6 28:12 33:4 33:22 40:16 41:15 unnecessary 30:4 34:5 35:9 39:10 unreliability 9:18 10:19,23 13:22 14:5 18:2 32:18 39:17 44:10 unreliable 4:16 4:17 6:15 7:11 8:19 9:4,23 17:14 20:3 23:6 23:23 24:19,23 25:13 26:1,12 33:9,11 37:23 41:25 42:3,10 42:25 44:21 45:12 48:23 50:9,24 upstairs 38:22 use 28:12 35:1 35:20 41:21
<hr/> T <hr/> T 2:1,1 take 10:2,18,19 18:20 26:7 33:20 36:23 44:4 46:15 52:21				

47:11,22 uses 45:17 usually 15:23 18:17 usurping 19:5 44:5	20:18,20,20 21:11 22:1,2,3 22:5,7,25 29:6 33:7 37:22,24 53:5 wanted 8:12 46:12 wants 29:15,15 44:2 47:14,21 Washington 1:8 1:20 wasn't 12:9 23:5 28:20 31:22 52:4 Watkins 53:7 way 7:16 9:12 18:16 19:4 22:15 23:8 28:24 29:24 32:4,4 37:6 39:8 40:13 49:24 ways 9:22 39:8 wearing 21:20 Wednesday 1:9 weeks 22:19 weight 20:24 went 15:13 17:8 We'll 3:3 we're 8:1 34:18 50:18 we've 5:2 7:24 20:10 23:24 26:3 28:14 Whoa 21:24 wife 18:20 window 7:23 8:2 31:8 32:5 36:23 37:7,15 38:18 39:13 40:3 witness 4:12 5:21 6:11 13:4 15:20 16:5,7 18:19 20:25 23:21,22 24:11 25:2,3	29:2 32:5 34:11 36:23 37:15 38:9,9,13 39:4 40:1 46:2,3,7 46:17,18,20,22 47:16,25 48:14 50:3 52:11,14 witnesses 4:13 29:11 52:9,23 witness's 4:6 28:11 40:3 53:4 woman 8:9 29:15 31:7 37:7 38:22 39:13 wonder 25:23 work 9:22 34:7 works 10:6 wouldn't 9:15,22 17:16 22:15 39:14 46:15,15 write 30:11 wrong 12:18 wrongful 26:4 wrote 39:8	2011 1:9 28 2:7 <hr/> 3 <hr/> 3 2:4 <hr/> 4 <hr/> 4 17:9 403 19:24 20:4 20:19,22 21:7 21:17 22:4 45:25 46:6,23 41 2:10 45 17:22 <hr/> 5 <hr/> 5 17:20 51 2:14 <hr/> 7 <hr/> 70 48:4 702 48:4 75 26:4	
<hr/> V <hr/> v 1:5 3:4 4:10 11:24 23:17,25 32:10,10 36:4 42:19 43:3 44:11 45:15 51:6 value 20:24 26:18,19 46:7 47:1 various 20:3 45:20 Ventris 45:13 verdict 42:20 victim 22:16,17 22:20,23 23:1,2 view 32:17 49:14 51:5 violate 50:9 violates 53:14 violation 7:19 34:23 41:25 42:5 49:19 Virginia 36:4 42:19 voice 6:8,11	<hr/> W <hr/> Wade 4:23 5:9 13:25 17:25 18:1 28:15 38:5 38:24,25 40:14 52:25 wait 21:24 30:2 waiter 18:23,24 want 7:25 8:6 12:15 16:11 19:16 20:5,11	<hr/> X <hr/> x 1:2,7 <hr/> Y <hr/> yard 29:13 yards 12:13 years 5:2 <hr/> 1 <hr/> 1 17:10,23 10 5:2 10-8974 1:4 3:4 10:02 1:13 3:2 10:58 53:22 100 21:5 46:18 15 5:2 1967 25:17 <hr/> 2 <hr/> 2 1:9 51:12,16 200 12:13		